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No. 86-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
Petitioner,

v.

WILLIAM R. BROCK, Secretary of Labor,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICI CURIAE* OF THE COMMONWEALTH OF VIRGINIA AND THE STATE OF MARYLAND IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

MARY SUE TERRY*
Attorney General of Virginia
Supreme Court Building
101 North 8th Street
Richmond, Virginia 23219
(804) 786-2071

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
7 North Calvert Street
Baltimore, Maryland 21202
(301) 576-6300

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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Question Presented

Whether an Interstate Compact entity exempt from all taxes and assessments and most regulations as a matter of federal law may properly be held liable to pay assessments levied by the District of Columbia into a "Special Fund" created by the D.C. Worker's Compensation Act to benefit certain D.C. employees.

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BRIEF *AMICI CURIAE* OF THE COMMONWEALTH OF VIRGINIA AND THE STATE OF MARYLAND IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICI

The Commonwealth of Virginia and the State of Maryland are signatories to the Washington Metropolitan Area Transit Authority Compact. Pub. L. No. 89-774, 80 Stat. 1324 (1966), as amended by the National Capital Transportation Act of 1972, Pub. L. No. 92-517, 92nd Cong., 2nd Sess., (1972), and the

Metro Transit Police Act of 1976, Pub. L. No. 94-304, 94th Cong., 1st Sess., (1976). *See* 1966 Va. Acts Ch. 2, *referenced at* Va. Code Ann. § 56-529 (1986); 1965 Md. Laws Ch. 869, *codified at* Md. Transp. Code Ann. § 10-204 (1977). The Compact created the Washington Metropolitan Area Transit Authority ("WMATA") as the interstate agency and instrumentality of Virginia and Maryland, as well as the District of Columbia. It invested and charged WMATA with responsibility for constructing, operating and maintaining a rail transit system and operating and maintaining comprehensive bus service for the people of the greater Washington area on behalf of the signatories. Virginia and Maryland have a continuing role in the construction, operation and maintenance of the rail transit system (Metrorail) and the operation and maintenance of bus service (Metrobus) through their representatives on the WMATA Board. Each signatory to the Compact also makes capital contributions to match federal appropriations for the capital construction program. In addition, signatories make contributions to WMATA's operating budget, from which WMATA pays damage awards and claims under the workers' compensation programs of all three jurisdictions.[1] The decision below, which requires WMATA to pay assessments into the special fund of the Longshoremen's And Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq*, (1982) (LHWCA) as it is applied through the District of Columbia Workers' Compensation Act (DCWCA), has a serious

[1] The suburban Virginia communities served by Metrorail and Metrobus also make substantial financial contributions to its operation.

and adverse financial impact upon Virginia and Maryland.

Besides a financial impact, the Commonwealth of Virginia and the State of Maryland have a governmental interest in having the Compact interpreted with uniformity and in accord with its specific language. The decision below, if not successfully challenged, portends other attempts to affect WMATA, a delicate, but heretofore effective, multi-state instrumentality of government and disregards several provisions of the WMATA interstate compact.

Consideration by this Court of the important federal question presented in this case is therefore of substantial interest to both States. *Cuyler v. Adams*, 449 U.S. 433, 438 (1980).

Unless the decision below is reversed, WMATA will be subjected to substantial taxes by the DCWCA Special Fund Assessment. The signatories and the residents of both states will be deprived of the benefit of WMATA's tax exemption and millions of dollars intended for funding direct operating costs will be diverted into the Special Fund to pay for work-related injuries incurred by employees of private employers subject to the DCWCA.

REASONS FOR GRANTING THE WRIT

A. The Wording of the Compact

The plain language and meaning of the Compact, particularly Sections 78 and 77, has been disregarded by the Court of Appeals in the decision below.

Section 78 of the Compact provides that WMATA "*. . .shall not be required to pay taxes or assessments*

upon any of its property, acquired by it or under its jurisdiction, control, possession or supervision or *upon its activities in the operation and maintenance of any transit facilities*. . .[Emphasis added]."

Section 77 of the Compact provides that WMATA ". . .shall, in connection with the performance of such [transit] service, be exempt from all laws, rules, regulations and orders of the signatories and of the United States otherwise applicable to such transit service and persons, except that laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing shall remain in force and effect. . ."

Notwithstanding the Compact language, the court below declined to find the assessments made by the Secretary to be taxes, but found them to be "user fees", or a "mechanism" of the workers' compensation program which it deemed to be a regulatory scheme.

The Signatories to the Compact at Issue Here Intended WMATA's Tax and Regulatory Exemptions to Be Interpreted Broadly.

Introduction

The State of Maryland and the Commonwealth of Virginia, at the behest of the federal government, first negotiated and then approved the WMATA Compact. National Capital Transportation Act of 1960, Pub. L. No. 86-669, § 202, 74 Stat. 537 *as amended by* National Capital Transportation Act of 1965, Pub. L. 89-173, § 7, 79 Stat. 666; S. Rep. No. 1491, 89th Cong., 2d Sess. 2-3 (1966); H.R. Rep. No. 1941, 89th Cong., 2d Sess. 3-4. (1966). Representatives of the federal government, the state of Maryland and the

Commonwealth of Virginia, and the District of Columbia spent five years "giving and taking and finally hammering out . . . a compact." *District of Columbia Area Transit Compact: Hearings Before Subcommittee No. 3 of the Committee on the Judiciary of the House of Representatives*, 89th Cong., 2d Sess. at 136 (1966) (Statement of Charles R. Fenwick). In fact, the Executive Branch of the federal government delayed transmitting the Compact and consent legislation to Congress for four months to allow all parties to reconcile any differences between themselves. *Id.* at 95 (Statement of Phillip S. Hughes). *See also Id.* at 77-78, 117-18 (Statements of Howard W. Smith and Walter J. McCarter, respectively). The precise terms of the Compact, including the tax exemption misinterpreted by the court below, were a product of negotiation and compromise among the signatories and the federal government.

Exemption From Taxation Per The Compact

Maryland and Virginia would not and did not agree to have the funds they dedicated to mass transit purposes diverted to tax or regulatory schemes. Rather, all the signatories intended to exempt WMATA from all taxes and assessments such as the DCWCA Special Fund Assessment. Otherwise, WMATA would have been subjected to competitive taxation and inconsistent regulation. As the courts have recognized, that result would negate the Compact, ignore its legislative history, and divert public funds supplied by the signatories and the federal government through construction and operating assistance grants from mass transit construction and operation to other purposes.

WMATA's tax exemption covers all taxes and assessments imposed on its property, activities, reve-

nue, and other income by the federal government, any signatory, or any municipal or local taxation. Pub. L. No. 89-774, § 78, *codified at* D.C. Code Ann. § 1-2431(78) (1981 ed.). Both the Senate and House of Representatives understood that this Compact provision was an exemption from *all* taxes and assessments of whatever nature or source. H.R. Rep. No. No. 1914, 89th Cong., 2d Sess. at 18 (1966); S. Rep. No. 1941, 89th Cong., 2d Sess. at 19 (1966).

The opinion below requiring WMATA to pay the Special Fund assessments subverts the intent of the signatories and Congress and harms WMATA, the taxpayers in the affected states, and WMATA's bondholders. WMATA must take necessary financial resources away from its primary function of transportation to pay these consistently growing assessments. Court of Appeals Joint Appendix 176-78. The money can only be raised by a diversion of revenue or an increase in funding by the local jurisdictions. It is improper to require the taxpayers of one state to involuntarily subsidize the worker's compensation benefits of private employers in another state. In short, citizens of one state are being taxed for the benefit of citizens of another state. Thus, forcing WMATA to pay the Special Fund assessment is a breach of faith between the federal government, the respective signatories to the Compact, the local citizens involved, and WMATA's bondholders.

Exemption From Regulation Per The Compact

Congress and the signatories to the Compact recognized that competing levies on the funds of WMATA were not the only way to damage WMATA's primary goal of providing mass transit services. Com-

peting and conflicting regulation would also lead to this undesirable result. WMATA's exemption from signatory laws was carefully drawn to limit the application of inconsistent laws and regulations:

> Except as otherwise provided in this Title, any transit service rendered by transit facilities owned or controlled by the Authority and the Authority or any corporation, firm or association performing such transit service pursuant to an operating contract with the Authority, shall, in connection with the performance of such service, be exempt from all laws, rules, regulations and orders of the signatories and of the United States otherwise applicable to such transit service and persons, except that laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing shall remain in force and effect; provided, however, that the Board may promulgate regulations for the safety of the public and employees not inconsistent with the applicable laws, rules, regulations or orders of the signatories and of the United States.

Pub. L. No. 89-774, § 77. That Congress intended to make this a very broad exemption from regulation is clear from the colloquy between Representatives Basil Whitener of North Carolina and Herbert Tenzer of New York during the floor debate. Rep. Whitener questioned the propriety of granting such a broad exemption. Rep. Tenzer replied that the exemption was required to ensure the marketability of WMATA bonds and to prevent WMATA from becoming an agency unable to function due to conflicting regula-

tions. The House then defeated Rep. Whitener's amendment deleting Section 77 of the Compact. 112 Cong. Rec. 25,682 (1966).

Two District Courts have interpreted Section 77 of the Compact. In each instance, the state law in question was deemed to fall to the Compact's language. Most recently, the Eastern District of Virginia court ruled that Virginia's Right to Work statute was not applicable to WMATA. Relying in part on Section 77 of the Compact, the court found:

> This exemption from regulation has been strictly constructed with the courts holding that the plain language of the statute provides that an individual signatory is prohibited from unilaterally subjecting [WMATA] to any legal burden or duty not specifically established by the Compact.

Malone v. WMATA, 622 F. Supp. 1422, 1428 (E.D. Va. 1985). The court quoted from the legislative history of § 77 as follows:

> With respect to Section 77, dealing with regulation, exemption from the separate regulation of the several signatories and the United States is essential. This is necessary not only to avoid conflicting standards of regulation but in order to make the revenue bonds of the Authority saleable. The investment market will insist that the Authority be entirely self-regulating with respect to fares, service and other activities which affect net revenues. This is a practically universal requirement in all revenue bond financing. Hearing of House of Representa-

> tives, Committee of the Judiciary, Subcommittee Report No. 3, 89th Cong., 2nd Sess., H.J. Res. 1163, July 20, 27, August 3, 1966, p. 235. *Accord* Senate Report 1491, Calendar No. 1457, p. 22, 89th Cong., 2nd Sess., August 24, 1966.

Id. at 1429. The result of the Court of Appeals' decision negates this granted exemption from the separate regulation that Congress thought essential.

The District Court for the District of Columbia in an unreported decision (Appendix A) ruled that WMATA is not subject to the District of Columbia Human Rights Act of 1977. *Gay Activists Alliance of Washington, D.C., Inc. v. WMATA*, No. 78-2217 (D.D.C. July 5, 1979).

Two other District Courts have treated uniformity under the Compact without direct reference to § 77 of the Compact. In *C.T. Hellmuth & Associates, Inc. v. WMATA*, 414 F. Supp. 408, 410 (D. Md. 1976), the court ruled that WMATA was exempt from the Maryland Public Information Act. Even though the signatories had similar laws, the court stated:

> Regardless of how similar the laws may be, plainly Maryland may not impose its preferences in this regard upon Virginia and the District, for such an imposition, however, minimal, is nonetheless an intrusion upon their interests in derogation of the Compact. Clearly then, Maryland may not unilaterally subject WMATA to the provisions of [the Maryland statute].

The rationale of the decision was that one party to a Compact cannot impose burdens upon the Compact absent concurrence of the other signatories.[2]

In *District of Columbia v. WMATA*, No. 74-1682 (D.D.C. 1975) (Appendix B), the district court discussed in dicta, relying on an analogous Compact situation reported in *Agesen v. Catherwood*, 26 N.Y.2d 521, 260 N.E. 2d. 525, 311 N.Y.S.2d 886 (1970), that § 77 of the Compact meant that the internal operations of WMATA were to be independent of the direct control of the signatory states.

While these cases are not binding upon this Court, resolution of controversies by lower federal courts are illustrative of how this Compact issue has been handled and how the court below should have ruled.

The Court of Appeals treatment of the Special Fund assessment as a regulatory fee is a return to the problems of conflicting regulation. The Court analyzed worker's compensation statutes as regulations: "the entire workers' compensation scheme, of which the Special Fund is an integral part, regulates employers' liabilities for industrial accidents. The scheme also indirectly regulates employers' conduct by holding them accountable for accidents and exacting increased contributions to the Special Fund when their proportion of direct compensation liabilities increases." *Brock v. WMATA*, 796 F.2d 481, 488 (D.C. Cir. 1986). The court concluded that the the Special Fund was part

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[2] WMATA has declined to pay to the Industrial Commission of Virginia the tax authorized to be collected under 65.1-129 of the Code which incorporates 65.1-139 (Second Injury Fund) and 65.1-147 (Uninsured Employer's Fund) on the same grounds that it advanced before the court below and to this Court.

of the regulation of the workers' compensation field. Consequently, the Special Fund assessment was a fee attendant to that regulation.

WMATA, however, is exempt under Section 77 from both state and federal regulation in all fields except safety and testing of facilities. Thus, the court's decision violates both the letter and spirit of the intent of Congress and the signatories in consenting to the WMATA Compact regarding competing regulation of WMATA.

B. Intergovernmental Immunity from Taxation

The principle of intergovernmental immunity from taxation has been incorrectly and in a strained fashion distinguished away by the Court of Appeals in the decision below.

To the extent the tax or assessment in question is not that of the United States, it is a tax or assessment of the District of Columbia, one of the signatories to the Compact. If the tax or assessment is thought to be that of the United States, Congress agreed for the United States that WMATA would not be subject to federal taxation.

By holding that the Special Fund assessments—no matter how burdensome and without reference to their disproportionate relationship to any benefit received by WMATA—are not taxes or assessments, the court below has disregarded not only the plain language of the Compact and its legislative history but the sovereign immunity enjoyed by WMATA as an instrumentality of Maryland and Virginia.

1. WMATA Shares the Sovereign Immunity of the Signatories from Federal Taxation and is Accordingly Exempt from the Special Fund Assessment.

WMATA shares the sovereign immunity of its signatories. By the terms of its congressionally sanctioned Compact, WMATA is an "agency and instrumentality of each of the signatory parties". Pub. L. 89-774, §§ 1(d), (e) and 4, *codified at* D.C. Code Ann. § 1-2431 (1d, e), (4) (1981 ed.). The Compact further provides at Section 78 that WMATA is "engaged in an essential government function." The obvious purpose of the signatories in adopting these provisions was to confer their sovereign immunity upon WMATA. The courts which have considered the issue have reached a similar conclusion. *Morris v. WMATA*, 781 F.2d 218, 222 (D.C. Cir. 1986); *Potomac Electric Power Co. v. State Corp. Comm'n*, 221 Va. 632, 635, 272 S.E.2d 214, 215 (1980). Neither the court below nor the Secretary of Labor questioned WMATA's right to assert its sovereign immunity as a defense in this case.

As a state agency or instrumentality WMATA is immune from federal taxation. *Massachusetts v. United States*, 435 U.S. 444, 453-463 (1978).[3] The Spe-

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[3] While the court below held that the operation of WMATA's public transportation system was not a governmental function and thus not entitled to immunity from taxation, that decision is contrary to the clear intent of Congress and the signatories in adopting Section 80 of the Compact and the declaration in Section 78 that WMATA is "engaged in an essential government function." Further, this Court abandoned the governmental/proprietary dichotomy in *Massachusetts*. *See also* Va. Code § 15.1-1370 (Repl. Vol. 1981) which provides that a transportation commission will be performing an essential governmental function

cial Fund is a tax. In *Carmichael v. Southern Coke & Coal Co.*, 301 U.S. 495 (1936) this Court held that a tax is a non-consensual exaction on any group of persons for public purposes, without regard to whether the taxpayer caused the condition being remedied or benefited from the exaction, or whether the benefit from the exaction was paid to individuals. *Id.* at 518, 521, 525. This court has also described a tax as an enforced contribution for the payment of public expenses. *Houck v. Little River Drainage District,* 239 U.S. 254, 266 (1915). The Special Fund satisfies these tests. It was intended to encourage the employment of previously injured and handicapped workers by spreading the cost of their compensation for any subsequent injury among all employers. H.R. Rep. No. 1441, 92nd Cong., 2d Sess. 8 (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4705-6. The Department of Labor, in the preamble to its regulations promulgated to implement the Special Fund provision, described it as follows:

> This special fund was established to give effect to a congressional policy determination that, under certain circumstances, the employer of a particular employee should not be required to bear the entire burden of paying for the compensation benefits due that employee under the Act. Instead, a substantial portion of such burden should be borne by the industry generally. . . .

20 C.F.R. § 702.144 (1986).

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in the exercise of the powers conferred upon it by the Transportation District Act of 1964, Va. Code § 15.1-1342 *et seq.* (Repl. Vol. 1981).

Thus, the signatories are being taxed to provide benefits for private employers utilizing the Special Fund.

The court avoided this issue by characterizing the Special Fund as a user fee or a regulatory fee to fit within this Court's discussion of permissible exactions in *Massachusetts v. United States*, 435 U.S. 444. In concluding that the Special Fund was a user fee, the court below ignored the requirement that such fees recover only a "fair approximation of each beneficiary's share of the cost." 435 U.S. at 460. Although the record below was clear that WMATA received less than fifty percent of the dollar value of the Special Fund assessment, the court below concluded that WMATA's benefits and costs were roughly approximate. It justified its conclusion by holding, without any supporting authority, that there need be only a rational intent to have the benefit conferred roughly approximate the amount levied in the future. *Brock v. WMATA*, 796 F.2d at 489.

The conclusion that the Special Fund is a regulatory fee is similarly flawed. As will be discussed *infra*, the Special Fund is not a part of the workers' compensation scheme. Further, even if it was, it is not regulatory in nature. As we have demonstrated above, the primary purpose of the Special Fund is generating revenue. Assessments are based on the size of the pool of carriers and self-insurers, not on any benefit WMATA receives from the Special Fund. See Va. Code § 65.1-129 (1950), as amended, which characterizes this type of exaction as a tax, not a fee.

2. The Special Fund Was Created to Serve Public Purposes and Is Not Part of the Basic Worker's Compensation Scheme.

Central to the decision of the Court of Appeals is its apparent conclusion that the Special Fund is an integral part of the workers' compensation system in the District of Columbia. As was discussed in more detail in WMATA's Petition for Certiorari, the Special Fund is not a part of the basic workers' compensation system in the District of Columbia. *Petition* p. 20. It is intended as a separate source of compensation for insured and certain other employees which is not directly related to their injuries.

The DCWCA Special Fund was intended to encourage the employment of previously injured and handicapped workers by spreading the cost of their compensation for any subsequent injury among all employers. H.R. Rep. 1441, 92nd Cong., 2d Sess. 8 (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698, 4705-6. The Special Fund also covers other costs, including those which were to have been borne by insolvent insurance carriers and self-insurers. 33 U.S.C. section 944(j)(2). The payments from the Special Fund are not directly proportional to WMATA's workers' compensation payments or to any other aspect of the basic workers' compensation scheme. Rather, the Special Fund is designed to spread certain costs secondary to actual workers' compensation payments among all its users. Viewed in this light, it clearly meets the test of *Carmichael* in that the exactions for the Special Fund are unrelated to the specific activities of the employers assessed.

Special Funds in other states are generally treated as separate and apart from the basic workers' compensation statute. *See* 2 A. Larson, *The Law of Workers' Compensation*, 59.31(a) (1982). Maryland has exempted WMATA from their respective workers' compensation special fund assessments as well as other levies that function as taxes, including unemployment taxes.[4] Virginia has sought payment from WMATA for its Special Funds, but WMATA has declined to pay it, citing § 78 of the Compact. The Maryland and Virginia special fund assessments, like the DCWCA Special Fund Assessment, are regarded as taxes. See Va. Code § 65.1-139 (Repl. Vol. 1980); [5] Md. Ann. Code art. 101, § 66(2) (Repl. Vol. 1985); *Carmichael v. Southern Coke and Coal Co.*, 301 U.S. 495; [6] *Massachusetts v. United States*, 435 U.S. 444.[7]

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[4] WMATA, like other government agencies, reimburses the signatories, including the District of Columbia, for actual costs paid on its unemployment claims.

[5] WMATA is a qualified self-insurer under Va. Code § 65.1-108 (Repl. Vol. 1980).

[6] In *Carmichael*, this Court defined a tax as any levy made on any class of persons for a public purpose where the levy does not provide the payer with any special benefit. 301 U.S. at 521-23. Assessments are a tax levied on a class of persons for a special public purpose. *Houck v. Little River Drainage District*, 239 U.S. 254, 266 (1915). *See* Appellant's Brief in the Court of Appeals at 18-28.

[7] In *Massachusetts*, this Court distinguished between a tax and a user fee, holding in pertinent part that user fees return a benefit to the payor roughly approximate in value to the amount of the exaction. 435 U.S. at 463-64.

WMATA does not contribute to these funds.[8]

Thus, without any apparent legislative support, the court below has transformed a statute which has the humanitarian goal of assisting insured workers into a regulatory scheme with an adverse financial impact on WMATA. In the process, it has imposed on WMATA and the signatories to the WMATA Compact ever growing assessments which have no connection to WMATA's operations, which will impair their financial status, and which the signatories and Congress intended to preclude.

For the foregoing reasons, and the reasons given in the Petition, this Court should grant WMATA's petition for a writ of certiorari and reverse the judgment below.

Respectfully submitted,

MARY SUE TERRY*
Attorney General of Virginia
Supreme Court Building
101 North 8th Street
Richmond, Virginia 23219
(804) 786-2071

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
7 North Calvert Street
Baltimore, Maryland 21202
(301) 576-6300

Counsel of Record

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[8] WMATA does pay the State of Maryland's annual audit fee, which is wholly devoted to defraying the state's costs to audit WMATA's Maryland workers' compensation program.

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2217

GAY ACTIVISTS ALLIANCE OF WASHINGTON, D.C., INC.,
Plaintiff,

vs.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

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JUL 5 1979

MEMORANDUM OPINION

This action by plaintiff Gay Activists Alliance of Washington, D.C., Inc. (Gay Activists) against Washington Metropolitan Area Transit Authority (WMATA) challenges WMATA's decision to reject a proposed advertisement for placement on car cards inside Metro buses. Plaintiff contends that WMATA's rejection of the advertisment violates the District of Columbia Human Rights Act of 1977, D.C. Code § 2-83, and the First Amendment and Equal Protection Clause of the Constitution. This matter is before us on plaintiff's motion for partial summary judgment. The American Civil Liberties Union has filed an *amicus curiae* memorandum in support of this motion. Defendant WMATA opposes. It is agreed that there are no genuine issues of material fact. For reasons discussed below, we first hold that defendant WMATA is not subject to the District of Columbia Human Rights Act of 1977 at least insofar as this Act applies to refusals to accept the pro-

posed advertisement of the Gay Activists.[1] We further find that defendant WMATA has created a public forum for political and social advertisements and cannot consistently with the First Amendment right of free speech refuse to accept plaintiff's proffered advertisement.

I. Statement of Facts

WMATA was established as a public service agency in 1966 through a Congressionally approved interstate compact for the purpose of improving the public transportation for the national capital region. Washington Metropolitan Area Transit Authority Compact, D.C. Code § 1-1431 (1973). WMATA received appropriations authorized by Congress to finance the design, engineering, construction and equipping of its facilities. Costs beyond those borne by commuters using WMATA transit facilities are shared among the federal, District of Columbia and participating local governments.

WMATA has administered an advertising program since 1973 (Deposition of John Warrington, Tr. 27), revenues from which being tax-exempt under the WMATA compact. *Id.* WMATA accepts advertising for the interiors and exteriors of its buses, subway stations and entry ways to subway stations. *Id.* at 6-7.

It appears undisputed that WMATA has regularly accepted advertisements which promote a variety of products, services and ideas. Affidavit of Andrew Jay Schwartzman, attached to plaintiff's motion for partial summary judgment. Among those are numerous advertisements for products which may be controversial, or the advertising of which may be controversial. For example, WMATA carries advertisements for tobacco products, alcoholic beverages and race tracks. WMATA has also carried advertisements for the pro-nuclear power positions of

[1] It it therefore unnecessary to consider whether this refusal would otherwise violate the Act.

the Edison Electric Institute, for an anti-abortion group called "Birthright of Northern Virginia," for the Rape Crisis Center, and for numerous religious organizations, including several groups such as the Unification Church and the Founding Church of Scientology.

To determine whether a particular advertisement is acceptable, WMATA generally refers to a set of guidelines. Deposition of Ralph Frisbee, Tr. 7. These guidelines apply to all requests for advertising regardless of whether the advertising is intended for the interiors or exteriors of its buses, subway stations or entry ways to subway stations. The first nine guidelines set artistic standards for the submitted advertisements, and also set standards prohibiting misleading claims. Guideline 10 more generally states that WMATA should "reject or remove any advertising which it deems to be not in the public interest."

On September 22, 1979, and prior to final action on plaintiff's request, a new Guideline 11 was proposed and adopted at a WMATA Board meeting. This guideline provides that:

> Items which might be objectionable to a substantial segment of the community should be avoided. For example, advertising depicting or referring to undesirable social behavior, or which might be offensive because of racial or religious preferences should be avoided. Copy which might be contrary to the best interests of the transit systems, or which might result in public criticism of the advertising industry and/or transit advertising will not be accepted.

The present controversy has its origin on March 21, 1978, when the Gay Activists filed a written request for advertising space. The proposed advertisement contains several photographs of Washingtonians displayed against a family photograph album page. A caption below this album contains the message, "Someone in Your Life is

Gay." Gay Activists is identified as the sponsor in a credit line at the bottom of the poster. Initially the request was made for public service (*i.e.*, reduced rate) advertising. Later the request was amended to include a request for commercial space. WMATA considered the advertisement for public service and commercial space.

Four WMATA officials participated, to varying degrees, in the decision whether to accept or reject the Gay Activists' advertisement: Mr. John Warrington, WMATA Director of Marketing, Mr. Ralph Frisbee, Head of Merchandising Branch in WMATA Office of Marketing, Mr. Theodore Lutz, then General Manager of WMATA and Mr. John C. Swanson, attorney in the WMATA Office of General Counsel.

Mr. Warrington was primarily responsible for making the decision to accept or reject the advertisement because the advertisement was "out of the norm." Mr. Warrington relied upon the advice of in-house counsel, Mr. John C. Swanson, to determine whether to accept or reject the advertisement. On the basis of the legal memorandum received from Mr. Swanson and Mr. Warrington's "cumulative sense" of the ten existing Guidelines, Mr. Warrington made his decision to reject the advertisement. Mr. Lutz, WMATA's General Manager and the person who ultimately approved the decision to reject the Gay Activists' advertisement, had also tentatively decided that, under the ten existing Guidelines, the advertisement was not acceptable.

On September 15, 1978, some six to seven months after plaintiff's original request for space, plaintiff's counsel wrote Mr. Lutz stating that if WMATA did not soon make a decision concerning the advertisement, plaintiff would have no option other than filing a lawsuit to require that a decision be made. On September 23, 1978, WMATA adopted Guideline 11 which generally proscribed advertisements which were "objectionable to a substantial seg-

ment of the community." Two days later, on September 25, 1978, WMATA notified the Gay Activists that its advertisement had been rejected. This present action was then filed on October 25, 1978 in the Superior Court for the District of Columbia, and, upon defendant's motion, removed to this Court on November 24, 1978.

II. Applicability of District of Columbia Human Rights Act

Section 231(a)(1) of the D.C. Human Rights Act of 1977, D.C. Law § 2-38, prohibits, *inter alia*, the denial to any person the "services, facilities, privileges, advantages and accomodations" of any place of public accommodation based on sexual orientation. Plaintiff alleges that defendant's refusal to accept the advertisement is a violation of this provision of the Act. Defendant in effect argues that it is unnecessary to decide whether the refusal violates the Act because the Human Rights Act of 1977 does not apply to WMATA. We agree with the defendant.

WMATA was established on February 10, 1967 by an interstate compact among Maryland, Virginia and the District of Columbia. Pub. L. No. 89-774, approved November 4, 1966. The terms of this compact provide no basis for inferring that the states and the District of Columbia intended WMATA to be bound by the provision of the District of Columbia Human Rights Act which is at issue in this litigation. Title III, Article VI, § 77, to the contrary, contains a general exemption "from all laws, rules, regulations and orders of the signatories and of the United States otherwise applicable to such transit service and person, except that laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing shall remain in force and effect. . . ." Section 77 and section 75, which requires compliance with the traffic laws of the signatories, jointly exempt WMATA from all states and local laws except those relating to traffic and safety. This broad exemption is only qualified by section

80 of the interstate compact. This section provides that "[t]he Authority shall be liable for its contracts and for its torts . . . committed in the conduct of any proprietory function in accordance with the law of the applicable signatory . . . ."

The formation of an interstate compact involves a carefully limited delegation of power. *West Virginia ex rel Dyer v. Sims*, 341 U.S. 22 (1951). This delegation connotes a limited surrender of sovereignty in a manner which is designed to promote the objectives of the contracting parties. *Delaware River and Bay Authority v. Carello*, 222 A.2d 794 (1966). Those objectives, such as the establishment of a metropolitan regional transit authority here, could be readily undermined if the entity established by the compact were subjected to the potentiality conflicting laws of the contracting parties. In this case, plaintiff would subject the compact entity WMATA to a District of Columbia Human Rights Law Provision barring discrimination on the basis of sexual orientation. This provision, so far as we can determine, has no counterpart in the laws of Maryland or Virginia and may in fact be contrary to the laws of these states. Absent some indicia of assent to this provision by the states of Virginia and Maryland, it cannot be said that this provision encompasses the sort of tort for which WMATA may be liable under section 80 of the interstate compact. *Cf. Delaware River and Bay Authority v. New Jersey Public Employment Relations Commission*. 270 A.2d 704 (1970) (no assent to labor relations law of one contracting state). Section 231(a)(1) of the D.C. Human Rights Act therefore falls within the general class of laws from which WMATA is exempt under the terms of the compact. *See, e.g., C. T. Hellmuth v. Washington Metropolitan Area Transit Authority*, 414 F. Supp. 408 (D. Md. 1976). We accordingly hold that WMATA cannot be liable for the allged violation of the D.C. Human Rights Act of 1977.

III. Constitutionality of Refusal to Accept Advertising

A. State Action

Defendant contends that its decision to refuse plaintiff's advertisement, being a private or proprietary act, did not involve state action and was therefore beyond the reach of the First, Fifth and Fourteenth Amendments.[2] This contention, however, is clearly contrary to the Supreme Court's decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). In *Lehman*, the Supreme Court squarely held state action is present when a city leases advertising space on public buses even though this leasing is a commercial venture incidental to the provision of public transportation. 418 U.S. 298, 303-04. WMATA is not a transportation system operated by a municipality such as the system operated by the city of Shaker Heights, Ohio. Instead, WMATA is a regional instrumentality created by the states of Maryland, Virginia and the District of Columbia. However, there is no constitutionally significant difference between the advertising decisions of a transportation system operated by a municipality and the advertising decisions of a transit system operated by an instrumentality created by an interstate compact. *See, e.g., Moskowitz v. Cullman*, 432 F. Supp. 1263, 1266 (D.N.J. 1977). Decisions of both types sufficiently implicate the state. Defendant therefore engaged in state action when it rejected the proposed advertisement of the Gay Activists.

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[2] The First Amendment right of free speech at issue in this litigation is applicable to states through the Fourteenth Amendment. Since the District of Columbia is not a state within the meaning of the Fourteenth Amendment, Bolling v. Sharpe, 347 U.S. 497, 499 (1954), First Amendment rights are made applicable to the District of Columbia through the Due Process Clause of the Fifth Amendment. Public Utilities Commission v. Pollack, 343 U.S. 451 (1952). In either case, there must be a sufficient governmental nexus or state action, in order for a state or the District of Columbia to be held to the standards of the First Amendment.

B. Access to Public Forum

(1) First Amendment Principles

The basic First Amendment issue presented in this action is whether defendant WMATA has created a public forum for speech concerning the social issue of homosexuality by accepting other forms of advertisements concerning concerning controversial subjects. If defendant has created such a forum, access to that forum can generally be limited only by regulations controlling the time, place and manner of speech. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 98 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). These regulations must be narrowly tailored to serve a substantial governmental interest. *Niemotko v. Maryland*, 340 U.S. 268 (1951). Regulations which discriminate among different types of speech, where a public forum has been created, on the basis of the content of the message cannot generally withstand this sort of scrutiny. *See, e.g., Gay Students Organization of the University of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, 417 F. Supp. 632, 639-40, n. 9 (D.R.I. 1976); *Lawrence University Bicentennial Commission v. City of Appleton, Wisconsin*, 409 F. Supp. 1319, 1323-24 (E.D. Wis. 1976).

2. Traditional Forum

The Supreme Court in *Lehman v. City of Shaker Heights, supra*, determined that the interior of a bus is not a traditional public forum for political speech. The Court found that the interior of a bus was not analagous to an open space, meeting hall, park, street corner or public thoroughfare which were historically used as settings for the public expression of ideas. *Id.*, 418 U.S. at 303. Instead, the interior of a bus harbors a captive audience which is unwillingly subjected to potentially offensive and intrusive messages. The commuter bombarded by those messages

may temporarily avert his gaze but the manipulative skills of the advertiser are invoked to continually thrust a particular product, life style or viewpoint before the eyes of the captive commuter. In *Lehman*, the Court sustained the ban on political advertising by a municipal transit system which had barred all political advertising but pointed out that because state action exists, "the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious or invidious." *Lehman v. City of Shaker Heights, supra*, at 303. In this action, plaintiff's claim that its advertisement must be accepted to preserve its right to nondiscriminatory access to a traditional public forum is misplaced.[3] The interior of a Metro bus is not a traditional public forum. It is clear that political and social advertisements can be excluded from a situs medium which is not a traditional public forum. This does not end our discussion.

3. Creation of Public Forum

The proprietor of what is otherwise not a traditional public forum may open the door to all forms of constitutionally protected[4] social or political speech by the acceptance of other constitutionally protected social or

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[3] Because of our subsequent holding that defendant has created a public forum for controversial social advertisements on the *interiors* of buses, we need not consider whether the *exteriors* of buses and advertising space on subway walls and entrances, are traditional public fora. Although plaintiffs assert that they have also sought to secure space on the exteriors of buses and in subway terminals, the record in this action only reflects an attempt to secure rental space on the interiors of Metro buses. *See, e.g.*, Letter from Mayo Lee to Thomas Brinton, March 21, 1978, attachment 5 to plaintiff's motion for partial summary judgment; Letter from Theodore C. Lutz to Leonard Graff, Sept. 25, 1978, attachment 7 to plaintiff's motion for partial summary judgment.

[4] The Supreme Court has recognized that several forms of speech are not entitled to the constitutional protection of the First Amendment. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (obsenity); Brandenburg

political speech. As noted above, the First Amendment does not authorize the selective exclusion of particular messages or viewpoints on the basis of their content. Thus, although the interiors of Metro buses are not a traditional public forum for the expression of social and political viewpoints, a city or regional transit system nevertheless may create a public forum for the advertising of social or political speech by the acceptance of other advertisements dealing with social or political issues.

4. Creation of Public Forum by WMATA

Applying these principles, it is apparent that WMATA could have rejected all advertising. WMATA, however, instead elected to accept a rather broad range of political and social advertising. Many advertisements accepted by WMATA are clearly of a controversial nature and could well be offensive to many captive bus riders. For example, WMATA has sold advertising space to the Edison Electric Institute for messages which advocate the development of nuclear power plants, to religious groups such as the International Meditation Society, the Unification Church (whose followers are referred to as "Moonies"), and the Founding Church of Scientology; to political candidates such as the communist Party nominees for President and Vice-President of the United States; to an anti-abortion group called Birthright of Northern Virginia for messages concerning non-abortion alternatives to pregnancy; even to Madame Bogard, a soothsayer. *See* affidavit of Andrew Jay Schwartzman, attached to plaintiff's motion for summary judgment.

WMATA has not only accepted such controversial advertisements but had done so without any sharply defined criteria for determining whether to accept or reject advertisements dealing with controversial political and social issues. At the time the plaintiff's advertisement was sub-

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v. Ohio, 395 U.S. 444 (1969) (words which imminently incite violence); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1973) (libel).

mitted, the only applicable guideline for distinguishing among the content of proposed advertisements was Guideline 10, which states that "WMATA reserves the right to reject or remove any advertising which it deems to be not in the public interest." This vague "public interest" standard was made only slightly more specific by the belated adoption of Guideline 11 which stated that "[i]tems might be objectionable to a substantial segment of the community should be avoided. . . ." Even with this clarification, the guideline provide no intelligible standard for discriminating among different social or political advertisements. For example, WMATA has argued that its professed policy or limiting bus advertisement space to innocuous and less controversial services-oriented advertisements prompted it to reject a subsequent advertisements by the Birthright of Northern Virginia. It contends that this policy would have prompted the rejection of an advertisement by the United Jewish Appeal Federation of an advertisement captioned "Let's Talk Turkey" submitted by the Armenian National Committee, Armenian Rights Movements of America. We, however, fail to see how the broad "public interest" and "objectionable to a substantial segment of the community" guidelines permit WMATA to accept an advertisement advocating nuclear power but not one opposing abortion to accept an advertisement by the Unification Church but not one by the United Jewish Appeal; or to accept an advertisement urging voters to elect members of the Communist Party but not one urging reconsideration of United States policy toward Turkey.

WMATA undeniably has a legitimate interest in preventing its captive riders from being exposed to the plaintiff's potentially offensive advertisements concerning the controversial topic of homosexuality. Many riders will undoubtedly take umbrage at the message that "Someone in Your Life Is Gay." WMATA, however, must pursue its interest within the limits of the First Advertisement: That Amendment reflects a profound national commitment to

the principle that debate on public issues should be uninhibited, robust and wide-open. . . ." *New York Times Co. v. Sullivan*, 370 U.S. 354, 270 (1964). More specifically, that Amendment prohibits public entities such as WMATA which open up a public forum for political and social speech from discriminating on the basis of the subject matter of this form of speech. The risk of arbitrarily censoring the expression of unpopular viewpoints is particularly evident where, as here, vaguely worded guidelines vest officials with broad discretion to accept or reject proposed advertisement.

This is not a case similar to the facts of *Lehman v. City of Shaker Heights, supra.* In *Lehman*, the transit system had guidelines which clearly and unequivocally prohibited the sale of space for political advertising. In addition, "[t]here was uncontradicted testimony at the trial that during the 26 years of public operation, the Shaker Heights system . . . had not accepted or permitted any political or public issue advertising . . . ." *Id.* at 300-01. In sharp contrast, the WMATA guidelines contain no such blanket prohibition of political or public issue advertising and WMATA has on several occasions accepted controversial political and social advertisements. As the record shows, these decisions, reflecting the personal and subjective reactions of decisionmakers were made in the absence of guidelines which are clear, precise and unequivocal.

Although we are sympathetic to WMATA's interests in raising advertising revenue and its natural desire to protect its riders from offensive messages, and to avoid public controversy, we are nevertheless compelled to hold that WMATA has run counter to the requirements of the First Amendment in its pursuit of these interests and desires,[5] WMATA has opened up a public forum for political and

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[5] In view of this disposition, it is not necessary to reach plaintiff's Equal Protection Argument.

social advertisements and cannot constitutionally exclude plaintiffs from access to that forum.[6]

An order consistent with the foregoing has been entered this day.

/s/ JOHN M. PRATT
John M. Pratt
United States District Judge

July 5th, 1979

[6] Our holding does not determine the amount of damages, if any, to which plaintiff is entitled as a result of a breach of its First Amendment rights. *See Carey v. Piphua*, 439 U.S. 347 (1978).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1682

DISTRICT OF COLUMBIA

Plaintiff,

vs

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Defendant.

FILED
MAY 14 1975

MEMORANDUM

This matter is before the Court on cross-motions for summary judgment. Plaintiff, the District of Columbia, has brought suit pursuant to D.C. Code Ann. §1-1431 (1973) on behalf of its agency, the Minimum Wage and Industrial Safety Board (the Board). It seeks a declaratory judgment that the defendant, Washington Metropolitan Area Transit Authority (WMATA) is required to make reports of injuries and death due to accident and illness pursuant to D.C. Code Ann. §36-438(c) (1973) and seeks an injunction to compel WMATA to make those reports filed with the U.S. Department of Labor and those to be made in the future available to the Board.*

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*The Board has requested that WMATA file with it copies of all accidents reported on form BEC-202 since WMATA assumed the functions of the D.C. Transit System on January 14, 1973. In addition, it has requested that WMATA fill out and return a document entitled "1973 Injuries and Illness Survey." WMATA has refused both requests. At oral arguments, WMATA volunteered to send the reports in question to the Board while disclaiming a legal duty to do so.

The Board has the duty to administer the provisions of the D.C. Code concerning industrial safety, has the power to "require employers to keep such records as it may deem advisable, and to furnish the Board with complete detailed reports relative to all accidents." D.C. Code Ann. §36-433 (1973). D.C. Code Ann. §36-438(c) (1973) provides that:

> Every employer shall submit to the Board within ten days from the date of any injury or death, or from the date that the employer has knowledge of any disease or infection resulting from any injury, a duplicate copy of the report provided for in section 430 of title 33, U.S. Code, as made applicable to the District of Columbia by sections 36-501 and 36-502.

Employers who carry on employment within the District of Columbia must file such reports, regardless of where the injury or illness occurred. D.C. Code Ann. §36-501 (1973).

The crux of the controversy is whether or not WMATA is an "instrumentality of the District of Columbia or the United States or any instrumentality thereof" within the meaning of D.C. Code Ann. §36-432(a) (1973). That section provides:

> Employer includes every person, firm, corporation, partnership, stock association, agent, manager, representative, or foreman, or other persons having control or custody of any place of employment or of any employee. It shall not include the District of Columbia or any instrumentality thereof, or the United States or any instrumentality thereof.

WMATA contends that it is specifically exempt from the provision requiring that employers file accident and injury reports because it is an instrumentality of the District of Columbia. It cites Title III, paragraphs 1(d), 2,

and 4 of the Washington Metropolitan Area Transit Authority Compact, Pub. L. No. 89-774, approved November 6, 1966, D.C. Code Ann. §1-1431 (1973), for that proposition. Paragraph 4 states:

> There is hereby created, as an instrumentality and agency of each of the signatory parties hereto, the Washington Metropolitan Area Transit Authority. . . .

Paragraph 2 is to the same effect. Paragraph 1(d) of the Compact defines signatory as the states of Maryland, Virginia and the District of Columbia.

WMATA further argues that conflicts and inconsistencies between the Compact and any other law are resolved by D.C. Code Ann. §1-1435(a) (1973) which provides:

> All laws or parts of laws of the United States and of the District of Columbia inconsistent with the provisions of Title III are hereby amended for the purpose of this subchapter by the extent necessary to eliminate such inconsistencies and to carry out the provisions of this subchapter and Title III and all laws or parts of laws and all reorganization plans of the United States are hereby amended and made applicable for the purpose of this subchapter to the extent necessary to carry out the provisions of this subchapter and Title III.

The District of Columbia cites another paragraph of that same Compact, in support of its position. Paragraph 77 exempts WMATA from certain laws except those relative to safety. It provides:

> Except as otherwise provided in this Title, any transit service rendered by transit facilities owned or controlled by the Authority and the Authority or any corporation, firm or association performing such transit service pursuant to an operating

> contract with the Authority, shall, in connection with the performance of such service, be exempt from all laws, rules, regulations and orders of the signatories and of the United States otherwise applicable to such transit service and persons, *except that laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing shall remain in force and effect*; provided, however, that the Board may promulgate regulations for the safety of the public and employees not inconsistent with the applicable laws, rules, regulations or orders of the signatories and of the United States. (Emphasis supplied)

It contends that the word "safety" as used in paragraph 77 should be given its ordinary and everyday construction. That is, it covers the laws and regulations guaranteeing the quality of safety within the province of the Minimum Wage and Industrial Safety Board. In reply, WMATA argues that paragraph 77 clearly does not permit the District of Columbia to usurp the rule-making functions relating to safety of the public reserved to WMATA.

The District of Columbia asserts that the filing of accident reports with the Board is necessary in order that the Board may take part in consultations with the Assistant Regional Director for Occupational Safety and Health of the Department of Health, Education and Welfare concerning specific areas of safety problems for which the Occupational Health and Safety Act of 1970 (OSHA), 29 U.S.C. §§651-78 (1970), has been made applicable. WMATA states that the Department of Labor itself has recognized that WMATA is not an employer within the meaning of OSHA Act, 29 U.S.C. §652(5) (1970), and is therefore not subject to OSHA jurisdiction. This, of course, is not a judicial determination. The definition of "employer" in the two acts is different. *Compare* D.C. Code Ann. §36-432(a) (1973) *with* 29 U.s.c. §652(5) (1970). De-

spite this, WMATA contends that the exclusions contained within each definition are basically the same where one excludes instrumentalities and the other excludes political subdivisions from the definition of employer.

The issue before the Court is one of first impression. The starting point of the analysis must be the statute itself. *March* v. *United States*, 506 F.2d 1306, 1313-14 (D.C. Cir. 1974). The plain meaning of paragraphs 2 and 4 of the Compact is that WMATA is an instrumentality of the District of Columbia. There is a paucity of judicial interpretation of the Compact which would aid in the resolution of the controversy. In *The Bootery Inc.* v. *WMATA*, 326 F. Supp. 794 (D.D.C. 1971), Judge Parker stated that WMATA was "merely an agency of each of the signatory parties including the United States on behalf of the District of Columbia." 326 F. Supp. at 798-99. The Court finds that WMATA is an instrumentality of the District of Columbia within the meaning of D.C. Code. Ann. §36-432(a) (1973).

The Court is not persuaded that paragraph 77 of the Compact requires reporting to the Board. *Agesen* v. *Catherwood*, 26 N.Y.2d 521, 260 N.E.2d 525, 311 N.Y.S.2d 886 (1970) is closely analogous to the case at bar. In *Ageson*, the Court of Appeals of New York held that the Port of New York Authority, a public authority created by a compact between New York and New Jersey, was not subject to New York's prevailing rate of wage legislation. It stated that the wage law was inapplicable because the Compact reflected a general intent that the internal operations of the Authority would be independent of the direct control of either state acting without the concurrence of the other. While *Ageson* may be confined to its own facts since it involves interpretation of the Port Authority Compact and New York law, it is useful in its general analysis of the relationship between an individual state's law and a compact between that state and another.

Plaintiff urges as persuasive, dicta which states that the Port Authority would surely be subject to New York's laws involving health and safety, insofar as its activities externally affected the public. *Ageson* v. *Catherwood*, *supra*, 26 N.Y.2d at 525, 260 N.E.2d at 526-27, 311 N.Y.S.2d at 888. Yet this reference is not supportive of the District's position. In this case, the reports sought concern the injuries of WMATA employees only and do not function as a reporting device for injuries and property damage to the public at large.

Judgment must therefore be entered for the defendant.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

DATED: May 15, 1975